

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KNIQUE DJON LAWRENCE,

Defendant-Appellant.

UNPUBLISHED

November 22, 2011

No. 299498

Oakland Circuit Court

LC No. 2009-229756-FC

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of two counts of armed robbery. MCL 750.529. The trial court sentenced him to serve concurrent prison terms of 51 months to 20 years for these convictions. Because we conclude there were no errors warranting relief, we affirm.

The jury convicted defendant of robbing Joshua Shipman and Patrick Lemon in August 2009. Shipman and Lemon testified that they were robbed at gunpoint while they were seated in a car and stopped at a traffic light. The primary issue at trial was identity. There was evidence that Shipman and Lemon identified defendant at the scene shortly after the offense, but neither was able to identify defendant at a later lineup or to positively identify defendant at trial. However, there was evidence that defendant had possession of Shipman and Lemon's stolen property less than an hour after the robbery. Defendant was also connected to the robbery through his hairstyle and distinctive clothing. Ultimately, the jury found that defendant was the person who robbed Shipman and Lemon.

Defendant argues that his convictions must be vacated because the evidence at trial was insufficient to establish his identity as the robber. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Identity is an element of every offense; as such, the prosecution must prove beyond a reasonable doubt that the defendant was the perpetrator. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). A positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime.

People v Nelson, 234 Mich App 454, 459; 594 NW2d 114 (1999). The credibility of identification testimony is to be determined by the trier of fact. *People v Davis*, 241 Mich App 699-700; 617 NW2d 381 (2000).

Shipman and Lemon identified defendant as the perpetrator approximately an hour after the robbery. Although the reliability of that identification was questioned at trial, evidence was also presented that Officer MacQuarrie saw Shipman and Lemon's stolen property in defendant's possession when MacQuarrie first encountered him on California Street shortly after the offense. MacQuarrie later recovered the stolen items from defendant's bedroom. Although defendant testified at trial that he obtained the items from "Jesse" in exchange for his cell phone and \$50, he did not provide that account to MacQuarrie. In addition, defendant later made the statement, "I wasn't the one with the gun," which is evidence that he was involved in the incident in some way. Shipman and Lemon also reported that the perpetrator had a hoodie with colorful markings and identified the hoodie at trial as the one worn by the robber. MacQuarrie testified that defendant was leaning on the hoodie when MacQuarrie saw him on California Street. Shipman and Lemon stated that the perpetrator was wearing his hair in braids. Defendant was wearing his hair in braids at the time of the offense and he admitted that Jesse did not have braids. Even with the weaknesses in the identification testimony, the circumstantial evidence linking defendant to the crime, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to identify defendant as the perpetrator of the armed robbery beyond a reasonable doubt.

Defendant next argues that the on-site identification procedure was impermissibly suggestive and violated his right to due process because the police singled him out and effectively told the complainants that he was the robber. Defendant did not challenge the validity of the on-site identification procedure below; therefore, this issue is unpreserved. Accordingly, defendant has the burden of establishing a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). In order to establish plain error, defendant must show that there was error, that the error was plain—that is clear or obvious—and that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Even then, the error might not warrant relief:

[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* (citations omitted).]

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "[W]hen 'the witness is shown only one person . . . , [the witness] is tempted to presume that he is the person.'" *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (citation omitted). Nevertheless, a one-man showup is not a per se violation of due process. *People v Hallaway*, 389 Mich 265, 282; 205 NW2d 451 (1973), citing *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972). Such one-on-one confrontations have been described as "reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is

connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance.” *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997). “[A]n improper suggestion often arises when the witness when called by the police or prosecution is told or believes that the police have apprehended the right person.” *Gray*, 457 Mich at 111 (quotation and citation omitted). In *Gray*, for example, an officer went to the victim’s home, told her that they had arrested the defendant for the assault, and then showed her a single photograph. The Court stated that the display combined with the statement was “highly suggestive.” *Id.* at 111, 114.

But even if an identification process is unnecessarily suggestive, the central question for purposes of due process analysis is whether under the totality of the circumstances the identification was reliable. *Manson v Brathwaite*, 432 US 98, 106, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977). To suppress evidence of an out-of-court identification, “[t]he defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification.” *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). When examining the totality of the circumstances, courts will consider “the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *Colon*, 233 Mich App at 305; see also *Manson*, 432 US at 114.

Here, defendant has not shown that the challenged identification amounted to plain error affecting his substantial rights. First, because defendant did not raise this issue below, the record was not fully developed with respect to the pertinent factors. Cf. *Winters*, 225 Mich App at 729 (declining to grant relief where the record was not sufficiently developed). Second, defendant has not shown that the identification testimony affected the outcome of the proceedings. The weaknesses of the identification evidence were fully presented to the jury. This case did not involve a suggestive identification procedure followed by increasingly certain identifications by the witness where the newfound certainty may have resulted from the impermissibly suggestive procedure. *Gray*, 457 Mich at 113. Instead, Shipman and Lemon candidly admitted the limited bases for their identification at the scene and their inability to recognize defendant by his features at the lineup, the preliminary examination, and at trial. Defense counsel explored and emphasized the weakness of the identification evidence. Moreover, as previously discussed, strong circumstantial evidence linked defendant to the crime apart from Shipman and Lemon’s identification testimony. Under the circumstances, we cannot conclude that the challenged identification evidence prejudiced defendant’s trial.

Defendant argues that trial counsel was ineffective for failing to object to the onsite identification evidence. In order to establish a claim of ineffective assistance of counsel, defendant must show that his trial lawyer’s decision not to object fell below an objective standard of reasonableness under prevailing professional norms and that, but for this error, there is a reasonable probability that the outcome of the proceedings would have been different. *Yost*, 278 Mich App at 387. As already noted, any error in the admission of the onsite identification evidence did not affect the outcome of the proceedings; as such, even if we were to conclude that defendant’s lawyer’s decision not to object fell below an objective standard of reasonableness under prevailing professional norms, that error would not warrant relief. *Id.*

Defendant also argues that counsel was ineffective for failing to follow through with their plan to introduce evidence (through defendant's testimony) that defendant had an avid interest in repairing and refurbishing phones and was pursuing training in electronics and digital media design. Defendant argues that this evidence was necessary to support his defense that he unwittingly purchased the complainants' stolen property. Because there was no evidentiary hearing, this Court's review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant's claim depends on matters asserted in his affidavit. The existing record, which merely shows that counsel withdrew a question about defendant's education, does not demonstrate that counsel was ineffective. Although defendant asserts that this Court should remand this case for an evidentiary hearing on this issue, we conclude that a hearing is not warranted.¹ Defendant's interest in refurbishing electronics and his alleged reason for acquiring the complainants' property does not make his account of purchasing the items from the man with the gun more plausible. Whether he wanted the cell phone and iPod for personal use or to tinker with them in pursuit of his hobby is not relevant to his identity as the robber. MRE 401. Even if the assertions in defendant's affidavit are true, they show that defense counsel made a strategic decision concerning what evidence to present and we will not second-guess defendant's lawyer's strategic decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell

¹ This Court previously denied defendant's motion to remand "for failure to persuade the Court of the necessity of a remand at this time." *People v Lawrence*, unpublished order of the Court of Appeals, entered June 29, 2011 (Docket No. 299498).